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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 515

W. E. B. DUBOIS CLUBS OF AMERICA; BROOKLYN DUBOIS CLUB; CHICAGO WESTSIDE DUBOIS CLUB; SAN FRANCISCO CITYWIDE DUBOIS CLUB; HUGH FOWLER; TERENCE HALLINAN; JOSE RISTORICCI; DONNA ALLEN; REV. JAMES BEVEL; REV. WILLIAM S. COFFIN; DAVE DELLINGER; RALPH DIGIA; FRANK EMSPAK; PROF. STAUGHTON LYND; JOHN LEWIS; CARL OGLESBY; REV. JOSEPH SITTLER; ELIZABETH SUTHERLAND; NORMAN THOMAS; DAGMAR WILSON,

Appellants,

—against—

RAMSEY CLARK, Attorney General of the United States; JOHN M. MAHAN, Chairman, and JOHN S. PATTERSON, SIMON MCHUGH, LEONARD L. SELLS and EDWARD C. SWEENEY, all members of the Subversive Activities Control Board,

Appellees.

PETITION FOR REHEARING ON GRANTING OF MOTION OF APPELLEES TO AFFIRM THE DISMISSAL OF THE COMPLAINT ON THE GROUND THAT APPELLANTS HAD FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

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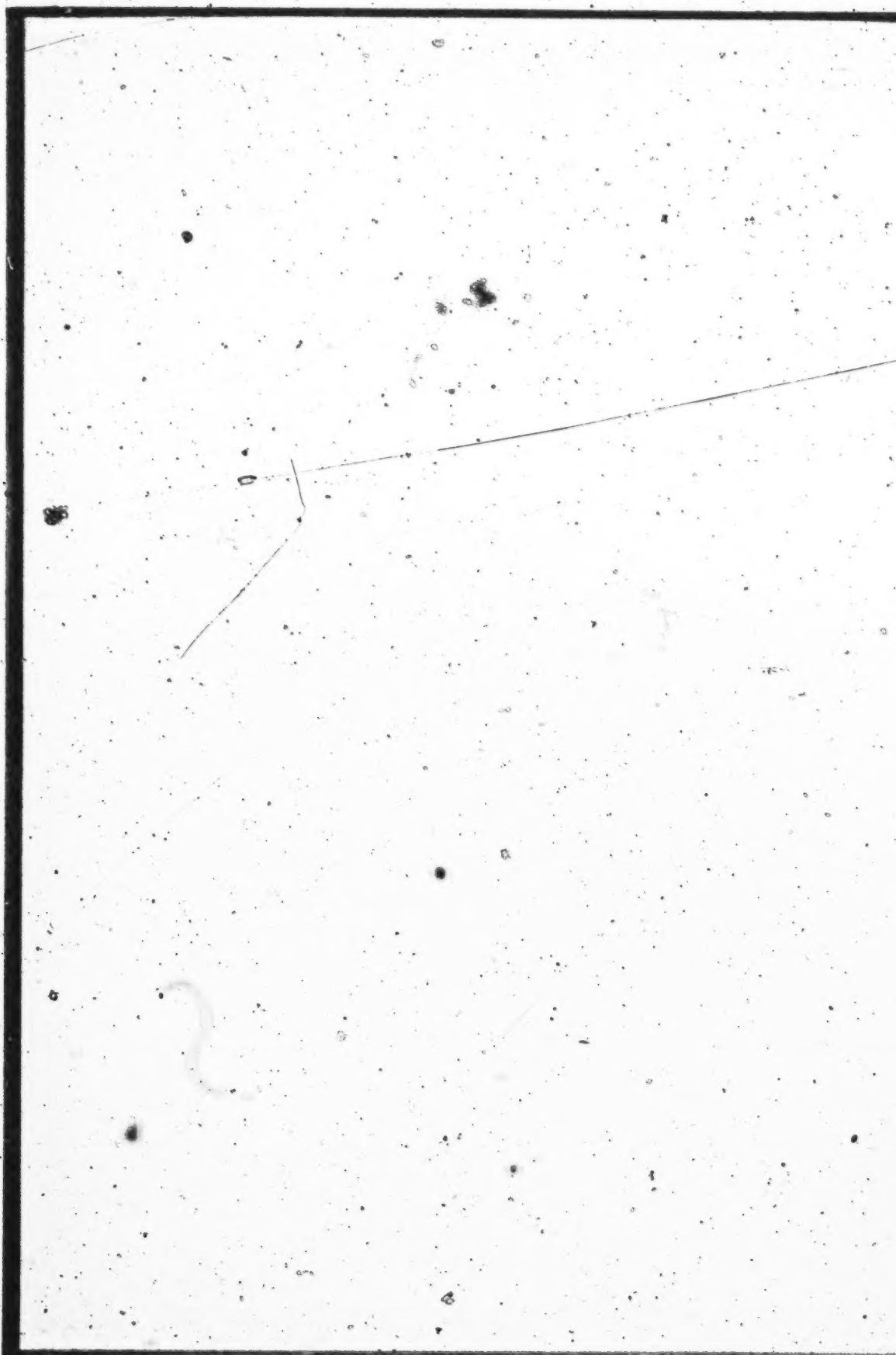
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RAMSEY CLARK, Attorney General of the United States; JOHN M. MAHAN, Chairman, and JOHN S. PATTERSON, SIMON MCHUGH, LEONARD L. SELLS and EDWARD C. SWEENEY, all members of the Subversive Activities Control Board,

Appellees.

PETITION FOR A REHEARING

Appellants request the Court to reconsider its ruling of December 11, 1967.

The Court's attention is respectfully called to the Jurisdictional Statement heretofore filed by appellants.

The Subversive Activities Control Act of 1950 was amended on January 2, 1968. The text of said amendment is attached hereto as an Appendix.

The statute, as amended, is, to put it conservatively, even more "at war with the First Amendment"[1] than its predecessor. For example, the definition of a "Communist-front organization" has been further "liberalized" to provide that an organization may be registered as a "Communist-front organization" if it "is substantially directed, dominated or controlled by *one* or more members of a Communist-action organization . . . ." [emphasis added][2] The Act previously defined a "Communist-front organization" as one which "is substantially directed, dominated or controlled by a Communist-action organization."[3]

The overbreadth of the original provision was eloquently discussed by Mr. Justice Douglas in his dissent to the *per curiam* affirmance.[4] The new alternate provision facil-

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[1] *W. E. B. DuBois Clubs of America, et al.* v. *Clark, et al.*, October Term, 1967, No. 515, slip opinion 5.

[2] Appendix, p. 2a.

[3] 50 U. S. C. 782 (4) (A).

[4] *W. E. B. DuBois Clubs, et al.* v. *Clark, et al., supra*, pp. 8-9. Compare Mr. Justice Douglas' assertion that: "[H]arassing them by public hearings and by probing into their beliefs and attitudes, pilloring them for their minority views by exposing them to the hearings under the Act—these actions will have the same 'chilling' effect as the Court held the trial in *Dombrowski* would have had" with that of House Majority Leader Carl Albert, in discussing the new amendment, that "[T]he 1967 act declared that the protection of our national security requires that Communist-action and Communist-front organizations be exposed to the critical light of publicity. This shall henceforth be the primary purpose of hearings and declarations by the SACB." *Congressional Record*, December 27, 1967, A6344.

itates bringing within the scope of the definitions section "advocacy, espousal and teaching of a creed or of causes for which the Communist movement stands."[5] The "serious consequences" of classification as a Communist-front organization, as outlined by Mr. Justice Douglas,[6] have been augmented in the new statute to include more expansive identification statements with reference to the use of the mails and the airwaves as well as a new area of such identification, viz., the solicitation of "any money, property, thing or service . . . ."[7]

Moreover, the new statute further provides that the Subversive Activities Control Board "shall cease to exist on June 30, 1969" unless between the date of its enactment and December 31; 1968, a proceeding thereunder "shall have been instituted before the Board and a hearing under this Act shall have been conducted by the Board."[8] The adverse effect of such congressional pressure upon the Board insofar as appellant DuBois Clubs of America is concerned needs no elaboration. It is enough to point out that when the existence of a governmental agency depends upon its exercise of its powers, those powers will be exercised.

Because, under the new legislation, the DuBois Clubs of America will be the critical case upon which the life of the agency will depend, there is little hope to expect that the organization will receive a fair and impartial hearing. Since, as demonstrated in our Jurisdictional Statement,

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[5] Id., at 8.

[6] Id., at 8-9.

[7] Appendix, p. 6a.

[8] Appendix, p. 7a.

the statute is unconstitutional at its face, there is no reason to require the affected appellant to undergo a long expensive and arduous hearing which can, under the circumstances, be no more than a farce.

We submit that, in the light of the above, appellants are entitled to an opportunity to brief and argue these important questions before the Court and to demonstrate the effect of the provisions of the new Act upon them or, at a minimum, to be granted leave to amend their complaint below to include an attack on its constitutionality.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that rehearing be granted and that, upon such rehearing, probable jurisdiction of the within appeal be noted or, in the alternative, appellants be granted leave to amend their complaint below to include an attack on the constitutionality of the Subversive Activities Control Act of 1950, as amended on January 2, 1968.

Respectfully submitted,

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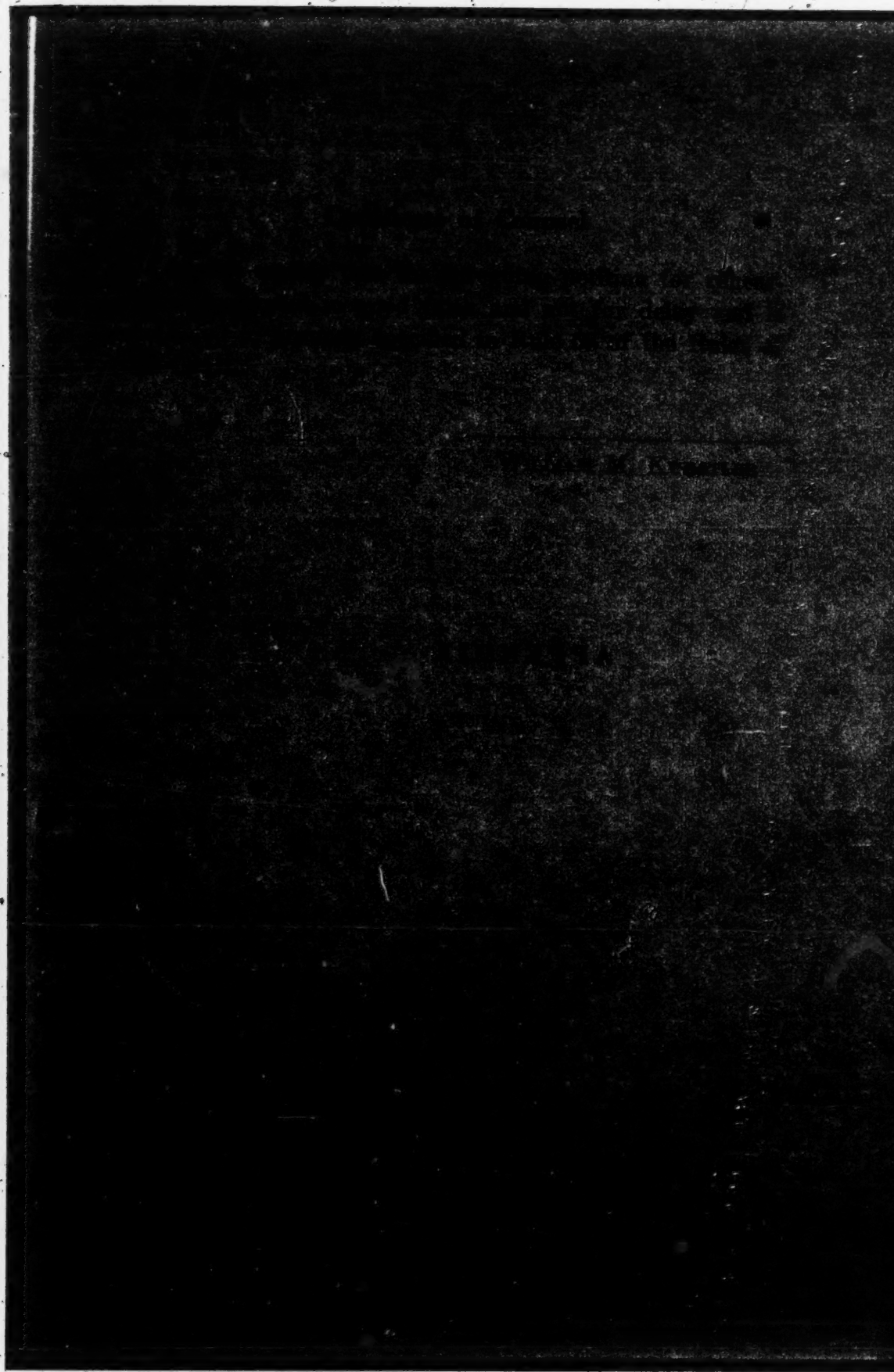
Attorneys for Appellants

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

WILLIAM M. KUNSTLER



APPENDIX

HOUSE OF REPRESENTATIVES

90TH CONGRESS
1st Session

REPORT
No. 1038

AMENDING THE SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950

That section 2 of the Subversive Activities Control Act of 1950 is amended by adding immediately after paragraph (15) the following new paragraph:

"(16) The findings of fact contained in paragraphs (1) through (15) of this section are reiterated. Recent court decisions involving the registration provisions of this Act make it necessary to enact legislation to accomplish the purposes of such Act without the requirements of registration. Disclosure of Communist organizations and of the members of Communist-action organizations as provided in this Act is essential to the protection of the national welfare."

SEC. 2. (a) Paragraphs (3) and (4) of section 3 of such Act are amended to read as follows:

"(3) The term 'Communist-action organization' means any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives

of such world Communist movement referred to in section 2 of this title.

"(4) The term 'Communist-front organization' means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, or (B) is substantially directed, dominated, or controlled by one or more members of a Communist-action organization, and (C) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title."

(b) Paragraph (12) of section 3 is amended by inserting "or 13A" immediately after "section 13".

SEC. 3. Subsection (f) of section 4 of such Act is amended by striking the last sentence.

SEC. 4. Section 5(a) of such Act is amended to read as follows:

"SEC. 5. (a) When there is in effect a final order of the Board determining any organization to be a Communist-action organization or a Communist-front organization, it shall be unlawful—

"(1) For any member of such organization, with knowledge or notice of such final order of the Board—

"(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

"(B) to hold any nonelective office or employment under the United States; or

"(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

"(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

"(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.

"(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice of such final order of the Board—

"(A) to contribute funds or services to such organization; or

"(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of paragraph (1) of this subsection."

SEC. 5. Sections 7 and 8 of such Act are hereby repealed.

SEC. 6. Section 9 of such Act is amended to read as follows:

"RECORDS OF FINAL ORDERS OF THE BOARD; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

"SEC. 9. (a) The Board shall keep and maintain records, which shall be open to public inspection, giving the names and addresses of all organizations as to which, and individuals as to whom, there are in effect final orders of the Board issued pursuant to any of the provisions of subsections (g) through (j), inclusive, of section 13, or subsection (f) of section 13A.

"(b) Copies of all public proceedings and hearings before the Board, including the reports and orders of the Board, shall be furnished by the Board to any person upon request and upon the payment of the reasonable costs thereof as then currently fixed by the Board.

"(c) The Board shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report giving the names and addresses of all Communist-action, Communist-front, or Communist-infiltrated organizations as to which, and all individual members of Communist-action organizations as to whom, there are in effect such final orders of the Board."

SEC. 7. Section 10 of such Act is amended to read as follows:

"USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

"SEC. 10. It shall be unlawful for any organization with respect to which there is in effect a final order of the Board

determining it to be a Communist organization as defined in paragraph (5) of section 3 of this title, or for any person with knowledge or notice of such final order acting for or on behalf of any such organization—

"(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General: 'Disseminated by .....,' (with the name of the organization in lieu of the blank) 'an organization determined by final order of the Subversive Activities Control Board to be a Communist-.....organization' (setting forth in lieu of the blank whether action, front, or infiltrated, as the case may be); or

"(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement: 'The following program is sponsored by .....,' (with the name of the organization in lieu of the blank) 'an organization determined by final order of the Subversive Activities Control Board to be a Communist-..... organization' (setting forth in lieu of the blank whether action, front, or infiltrated, as the case may be); or

"(3) to use the United States mails or any means, facility, or instrumentality of interstate or foreign commerce, including but not limited to radio and television broadcasts, to solicit any money, property, thing, or service, unless such solicitation if made orally is preceded by the following statement, and if made in writing or in print is preceded by the following written or printed statement: 'This solicitation is made for or on behalf of .....,' (with the name of the organization in lieu of the blank) 'an organization determined by final order of the Subversive Activities Control Board to be a Communist-..... organization' (setting forth in lieu of the blank whether action, front, or infiltrated, as the case may be)."

SEC. 8. Section 11 of such Act is amended to read as follows:

"DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

"Sec. 11. (a) Notwithstanding any other provision of law, no deduction for Federal income tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution there is in effect a final order of the Board determining such organization to be a Communist-action, Communist-front, or Communist-infiltrated organization.

"(b) No organization shall be entitled to exemption from Federal income tax, under section 501 of the Internal Revenue Code of 1954, for any taxable year if at any time during such taxable year there is in effect a final order of the Board determining such organization to be a Commu-

nist-action, Communist-front, or Communist-infiltrated organization."

SEC. 9. (a) Paragraph (2) of subsection (e) of section 12 of such Act is amended to read as follows:

"(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any organization as to which there is in effect a final order of the Board determining such organization to be a Communist-action organization; and".

(b) Section 12 of such Act is amended by adding at the end thereof the following new subsection:

"(i) The Board shall cease to exist on June 30, 1969, unless in the period beginning on the date of enactment of this subsection and ending on December 31, 1968, a proceeding under this Act shall have been instituted before the Board and a hearing under this Act shall have been conducted by the Board. On or before June 30, 1968, the Attorney General shall report to the Congress on the proceedings he has instituted before the Board under this Act during the period from the enactment of this subsection to the date of the report, and the Board shall report on the progress it has made in conducting hearings under the Act during such period. If no proceedings have been instituted before the Board by the Attorney General, the Attorney General shall report his reasons for not having done so. If no hearings have been conducted, the Board shall report the reasons for not having done so. Similar reports shall be filed by the Attorney General and the Board on or before

January 10, 1969, and each year thereafter, to cover the immediately preceding calendar year."

SEC. 10. (a) The caption to section 13 of such Act is amended by striking out "REGISTRATION".

(b) Subsections (a) and (b) of section 13 of such Act are amended to read as follows:

"(a) Whenever the Attorney General shall have reason to believe that any organization is a Communist-action organization or a Communist-front organization, or that any individual is a member of an organization which has been determined by final order of the Board to be a Communist-action organization, he shall file with the Board and serve upon such organization or individual, as the case may be, a petition for a determination that such organization is a Communist-action or Communist-front organization, or determining that such individual is a member of such Communist-action organization. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support thereof. Two or more such individual members of a Communist-action organization or of any section, branch, fraction, cell, board, committee, commission, or unit thereof, may be joined as respondents in one petition for an order determining each of such individuals to be a member of such organization. A dissolution of any organization subsequent to the date of the filing of any petition for a determination that such organization is a Communist-action or Communist-front organization shall not moot or abate the proceedings, but the Board shall receive evidence and proceed to a determination of the issues: Provided, however, That if the Board shall find such organization to be a Com-

munist-action or Communist-front organization as of the time of the filing of such petition and prior to its alleged dissolution, and shall find that a dissolution of the organization has in fact occurred, the Board shall enter an order determining such organization to be a Communist-action or Communist-front organization, as the case may be, and the Board shall include it as such in the appropriate records maintained pursuant to section 9 of this title, together with a notation of its dissolution.

"(b) Any organization as to which there is in effect a final order of the Board determining it to be a Communist-action or Communist-front organization, and any individual as to whom there is in effect a final order of the Board determining such individual to be a member of a Communist-action organization may, not more often than once in each calendar year, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-action or Communist-front organization, or that such individual no longer is a member of a Communist-action organization, as the case may be. Each petition filed under this subsection shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice."

(c) Subsection (c) of section 13 of such Act is amended by inserting immediately preceding the last sentence the following new sentence: "No person, on the ground or for the reason that the testimony or evidence, documentary

or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture, shall be excused from testifying or producing documentary evidence before the Board in obedience to a subpena of the Board issued on request of the Attorney General when the Attorney General represents that such testimony or evidence is necessary to accomplish the purposes of this title; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he, under compulsion as provided in this subsection, may testify, or produce evidence, documentary or otherwise, before the Board in obedience to a subpena issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

(d) Subsection (d) of section 13 of such Act is amended by striking out paragraph (2) and inserting in lieu thereof the following:

"(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board in proceedings initiated pursuant to subsection (a) of this section, the Board shall, nevertheless, proceed to receive evidence, make a determination of the issues, and enter such order as shall be just and appropriate. Upon failure of an organization or individual to appear at a hearing accorded to such organization or individual in proceedings under subsection (b) of this section the Board may forthwith and without further proceedings enter an order dismissing the petition of such organization or individual.

"(3) Any person who, in the course of any hearing before the Board or any member thereof or any examiner

designated thereby, shall misbehave in their presence or so near thereto as to obstruct the hearing or the administration of the provisions of this title, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. Whenever a statement of fact constituting such misbehavior is reported by the Board to the appropriate United States attorney, it shall be his duty to bring the matter before the grand jury for its action.

"(4) The authority, function, practice, or process of the Attorney General or Board in conducting any proceeding pursuant to the provisions of this title shall not be questioned in any court of the United States, nor shall any such court, or judge or justice thereof, have jurisdiction of any action, suit, petition, or proceeding, whether for declaratory judgment, injunction, or otherwise, to question such authority, function, practice, or process, except on review in the court or courts having jurisdiction of the actions and orders of the Board pursuant to the provisions of section 14, or when such authority, function, practice, or process, is appropriately called into question by the accused or respondent, as the case may be, in the court or courts having jurisdiction of his prosecution or other proceeding (or the review thereof) for any contempt or any offense charged against him pursuant to the provisions of this title."

(e) Paragraph (1) of subsection (f) of section 13 of such Act is amended to read as follows:

"(1) the extent to which persons who are active in its management, direction, or supervision, whether or

not holding office therein, are active in the management, direction, or supervision of, or as representatives or members of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and".

(f) Subsections (g), (h), (i); (j), and (k) of section 13 of such Act are amended to read as follows:

"(g) If, after hearing upon a petition filed under subsection (a) of this section the Board determines—

"(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order determining the organization to be a Communist-action organization or a Communist-front organization as the case may be; or

"(2) that an individual is a member of a Communist-action organization it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order determining such individual to be a member of a Communist-action organization.

"(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

"(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General

an order denying the determination sought by his petition, and shall send a copy of such order to such organization; or

"(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General an order denying the determination sought by his petition, and shall send a copy of such order to such individual.

"(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

"(1) that an organization no longer is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General and such organization an order determining that the organization no longer is a Communist-action organization or Communist-front organization as the case may be; or

"(2) that an individual no longer is a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the Attorney General and such individual an order determining that such individual no longer is a member of a Communist-action organization.

"(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

"(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for a determination that the organization no longer is a Communist-action organization or a Communist-front organization as the case may be; or

"(2) that an individual is a member of a Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon such individual an order denying his petition for a determination that the individual no longer is a member of a Communist-action organization.

"(k) When any order of the Board issued under subsection (g), (h), (i), or (j) of this section becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all persons that such order has become final."

SEC. 11. Section 13A of such Act is amended as follows:

(1) Subsection (a) of such section is amended by inserting immediately preceding the last sentence the following new sentence: "A dissolution of such organization subsequent to the date of the filing of any petition for a determination that it is Communist-infiltrated, shall not moot or abate the proceedings, but the Board shall receive evidence and proceed to a determination of the issues: Pro-

vided, however, That if the Board shall determine such organization to be a Communist-infiltrated organization as of the time of the filing of such petition and prior to its alleged dissolution, and shall find that a dissolution of the organization has in fact occurred, the Board shall enter an order determining such organization to be a Communist-infiltrated organization and the Board shall include it as such in the appropriate records maintained pursuant to section 9 of this title, together with a notation of its dissolution."

(2) Subsection (d) of such section is amended to read as follows:

"(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section."

SEC. 12. The seventh sentence of subsection (a) of section 14 of such Act is amended to read as follows: "If the court shall set aside an order issued under subsection (j) of section 13, or under subsection (f) of section 13A, it may, in the case of an organization, enter a judgment requiring the Board to issue an order determining that such organization no longer is a Communist-action organization, Communist-front organization, or a Communist-infiltrated organization, as the case may be, or in the case of an individual, enter a judgment requiring the Board to issue an order determining that such individual no longer is a member of a Communist-action organization."

SEC. 13. Section 15 of such Act is amended to read as follows:

"PENALTIES

"SEC. 15. Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of section 5 or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment."

SEC. 14. (a) In the case of any organization which, by proceedings under section 13(a) of the Subversive Activities Control Act of 1950 completed before the date of enactment of this Act, has been finally determined by the Subversive Activities Control Board to be a Communist-action organization or a Communist-front organization and has been ordered to register as a result of such determination, the Board shall forthwith modify its previously issued registration order as may be necessary to conform such order to the provisions of section 13(g) of the Subversive Activities Control Act of 1950, as amended by this Act, and shall forthwith include such organization on the record required to be maintained under section 9 of the Subversive Activities Control Act of 1950, as amended by this Act. Nothing in this subsection shall be construed so as to prevent any such organization from filing a petition as provided in subsection (b) of section 13 of the Subversive Activities Control Act of 1950, as amended by this Act.

(b) In the case of any proceeding pending before the Board on the date of enactment of this Act, the Board and the Attorney General are authorized to proceed in accordance with the provisions of the Subversive Activities Control Act of 1950, as amended by this Act.